SUPREME COURT, U. S.

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OCTOBER TERM 1974

No. 74-980

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of EDYTH D. BUSH, Deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of ARCHIBALD G. BUSH, Deceased,

and

THE BUSH FOUNDATION,

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,

Respondents.

REPLY OF BUSH FOUNDATION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MINNESOTA

EDWARD J. CALLAHAN, JR.
JOHN W. MOOTY
GRAY, PLANT, MOOTY & ANDERSON
300 Rand Tower Building
Minneapolis, Minnesota 55402
612-339-9501
Attorneys for Bush Foundation

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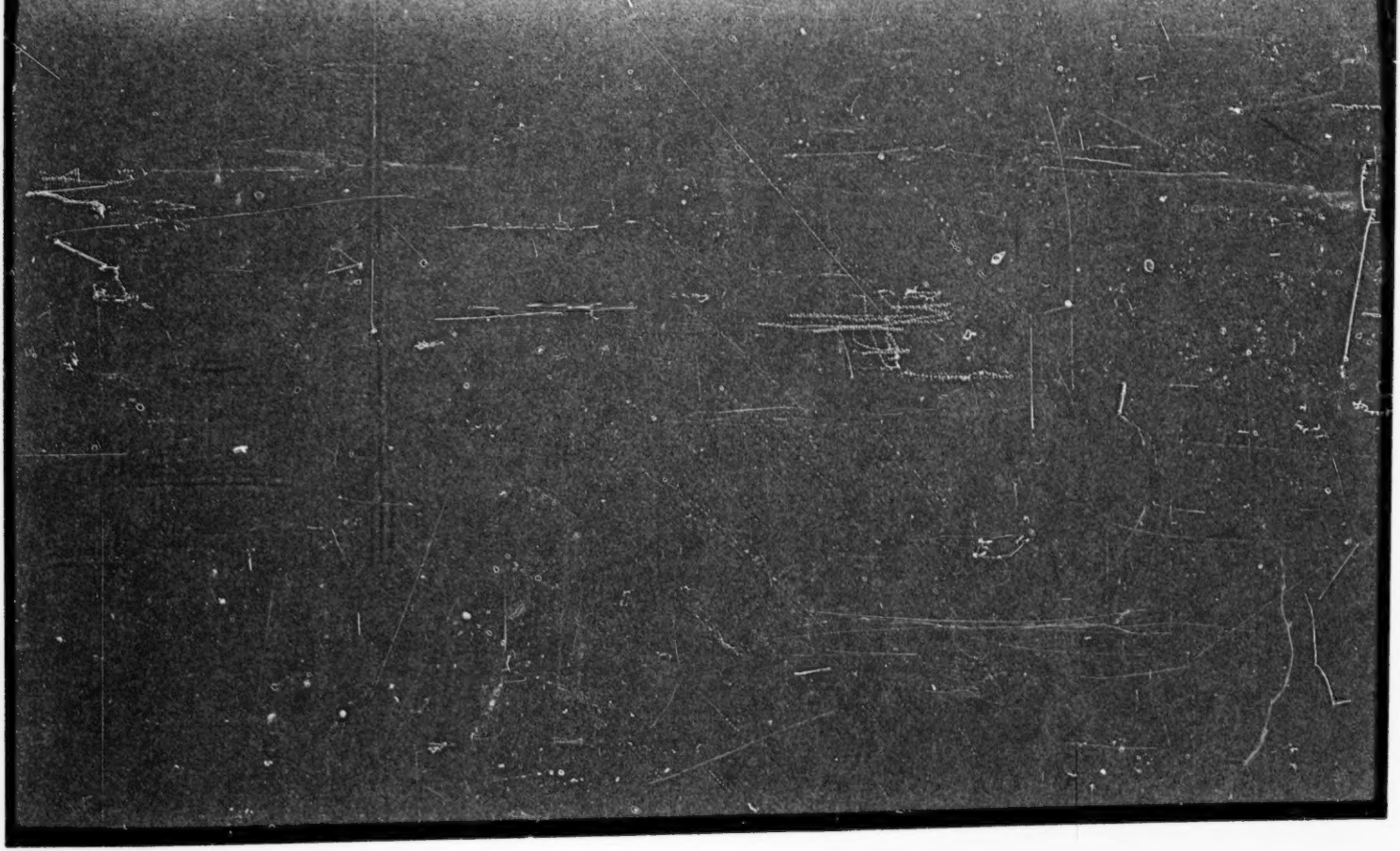

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A number of years ago a well known performer of satirical songs by the name of Alan Sherman recorded a song he made popular in which he refers to a certain ladies dress which the character in the song is selling as "a genuine

copy of fake Dior". The so-called due process problem presented by the petitioners here bears almost as much resemblance to a true due process issue as the "genuine copy" does to the original dress.

As a start to their flight of fancy they have mistated to this Court the basic question presented. The Ramsey County Probate Court, the Ramsey County District Court on appeal, the Minnesota Supreme Court on appeal and again on a petition for rehearing all were faced with the basic issue presented by the provisions of *Minnesota Statute* 525.-212 (the "renunciation" statute) which reads as follows:

> "If a will made provision for a surviving spouse in lieu of the rights in the estate secured by statute, such spouse shall be deemed to have elected to take under the will *unless he shall have filed an instrument in writing renouncing and refusing to accept the provisions of such a will within six months* after the filing of the certificate of probate. *For good cause shown* the Court may permit an election within such further time as the Court may determine."

Undeniably no instrument in writing even purporting to renounce the will was filed for over 5½ years after the filing of the certificate of probate. Moreover, the Probate Court did not permit the petitioners to file a belated renunciation nor was good cause shown (Pet. Appendix A-15, A-18). Each Minnesota Court decided, reasonably enough, that the right of Mrs. Bush to renounce no longer existed. There was, therefore, no need to reach an additional question, to wit: Would Mrs. Bush's right to renounce, if exercised within six months of filing of the certificate of probate, nevertheless have been barred in any event by her written consent to the will of her husband.

QUESTION PRESENTED

The true question presented therefor is:

Whether due process is denied when a state court determines after a full hearing on undisputed facts, that a document filed more than 5 years after the statutory period does not constitute a renunciation.

The questions presented in the petition here, mistate the facts and circumstances, and even at best are expressive of only one of the many reasons why Mrs. Bush's representatives were not successful below.

ARGUMENT

It is, of course, obvious that to have even specious support for a due process claim, the petitioners must attempt to tie their claim to the Petition for Certiorari filed in this Court as No. 74-551, denied January 13, 1975, and most recently denied on requst for reconsideration on February 24, 1975. We assume that through that Petition and other memoranda connected with it, the Court is familiar with the background of the "renunciation" litigation presently under discussion and so we will not elaborate thereon in a separate statement of facts here. But we are pleased to note that at long last petitioners have abandoned any claim to have any right to recover damages for breach of the settlement contract of August 1966. (Petition, page 8). The phrase used by them is that Mrs. Bush has been "done out of" the right. She was not "done out of" it by the Minnesota courts in the action giving rise to the present Petition, however, because the Probate Court of Ramsey County has absolutely no jurisdiction over questions involving fraud or breach of contract, as all parties to the current action acknowledge. It did not and could not have passed upon

any such matter. As a result of the Probate Court's jurisdiction limitations in this regard, the District Court of Ramsey County, as an appeal court, also lacked jurisdiction to pass on them nor did it attempt to. The Foundation does concede that if a breach of contract or fraud action were properly commenced in Minnesota at this time, the result would be complete failure on the part of Mrs. Bush's representatives for reasons of res judicata and estoppel and the Statutes of Limitations among other. And it concedes that Judge Jergens of the Federal District Court was correct in his judgments on these points. And we point out that in the absence of a determination of breach of contract or fraud by a Court of competent jurisdiction the petitioners have not even the semblence of an argument to try to show "good cause" within the provisions of *M.S.A.* 525.212 (*supra*).

We also note that the Eighth Circuit does not share the shock of these petitioners at the application of the doctrine of res judicata arising from the judgment of Judge Godfrey April 10, 1970, nor is it unable to understand the clear import of the dicta in *Bush v. Arrowood,* 293 Minn. 243, 198 N.W.2d 263, 265 (1972).

> "We need not decide whether the personal rights of Mrs. Bush have been adjudicated and are therefore res judicata. The trial court felt that they were. The Minnesota district court in its memorandum and order, which is now on appeal to the Minnesota Supreme Court, indicates that the personal rights of Mrs. Bush have been adjudicated. The Judgment and Decree in the state court settlement (April 10, 1970) so indicates. See also *Bush v. Arrowood,* 293 Minn. 243. 198 N.W.2d 263, 265 (1972), *Bassler v. Arrowood,* 500 F.2d 138 (1974) p. 143

In any event (Petition, page 9), three reasons are advanced for granting the writ, none of which is in any way based upon the facts or legal conclusions of the Minnesota Court.

a) The Supreme Court of the State of Minnesota did not hold that the judgment in *Bush v. Arrowood, supra,* concerning fees, barred the rights of a litigant in this case.

The Court *did* comment (Petitioner Appendix A24, 25) that in fact the fee case did involve becoming familiar with the same *facts* used as the basis for their current decision, and it did suggest that petitioners would have been well advised to give considerable weight to the court's dicta in the fee case before embarking on this current flight of fancy. We assume the Eighth Circuit would have a similar reaction if called upon now to decide the breach of contract claim on its merits rather than on the grounds of abstention.

b) The Supreme Court of Minnesota did not hold that a judgment may operate as res judicata without a hearing determining Mrs. Bush was a party to the judgment. In fact, the Court in its opinion, (Pet. Appendix, beginning on page 9 through 13) sets out a considerable amount of undisputed and indisputable evidence upon which it reached its determination Mrs. Bush was a party to the judgment in *Bush v. Arrowood, supra,* personally, and on pages A21 through A23 the Court further considered the evidence and its effect. The Court's conclusions were clearly correct, but it is not their correctness which dispose of the due process problem, it is the fact that the issues were fully and fairly presented for adjudication.

Neither did the Court determine that a judgment was res judicata without evidence on whether the issue held foreclosed could have been raised in the prior proceedings.

Instead it held that on the evidence of the pleadings, settlement and judgment by Judge Godfrey, the issue foreclosed had *in fact* been raised in the prior proceedings *with Mrs. Bush's consent*, without objection, and had been settled, referring specifically to the Attorney General's claims and Mrs. Bush's reply in that case.

c) Lastly the Court did not determine that an action by Mrs. Bush *in a representative capacity may be res judicata* of the personal rights of Mrs. Bush. It held that Mrs. Bush was *not*, in fact, litigating in a representative capacity or merely in that capacity, but was litigating her own personal rights in seeking to uphold the August 1966 settlement and retain her $2,100,000.

[As to Mrs. Bush's alleged incapacity, not only is there no evidence or support for these allegations [Appendix A26] but the legal proposition stated that "nor can any judgment bind one known for more than a year prior to the entry of the judgment to have been incompetent (Pet. 9) is pure nonsense.]

Mrs. Bush in the case before Judge Godfrey "sought only to compel respondents to carry out her husband's will" say the petitioners (page 8). She also sought to retain the $2,100,000 she received in consideration of her execution of the settlement agreement (A-11). Before Judge Godfrey she was successful on both counts, and her success is memorialized in the judgment. Let her not complain now that she got her way. Nothing could be less in accordance with the objective of carrying out her husband's will than to renounce it. The petitioners may disagree with the rulings in the current case, but they cannot deny all issues raised here were considered and decided upon evidence cited in the opinion of the Minnesota Supreme Court.

CONCLUSION

The Writ should not issue, the Petition should be denied with costs and disbursements to respondent.

Respectfully submitted,

GRAY, PLANT, MOOTY & ANDERSON
By EDWARD J. CALLAHAN, JR.
Attorneys for Bush Foundation
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 339-9501